Filed 12/7/16 Fairbanks v. Farmers New World Life Ins. Co. CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

PAULINE FAIRBANKS et al., Plaintiffs and Appellants, v. FARMERS NEW WORLD LIFE INSURANCE COMPANY et al., Defendants and Respondents.	B257386 (Los Angeles County Super. Ct. No. BC305603)

Appeal from an order of the Superior Court of Los Angeles County, Anthony J. Mohr and Amy D. Hogue, Judges. Affirmed.

Law Offices of Robert S. Gerstein, Robert S. Gerstein; Girardi Keese, John A. Girardi; Reich & Binstock, Dennis Reich; and John Theodore Nockleby for Plaintiffs and Appellants.

Norton Rose Fulbright US, Peter H. Mason, Joshua D. Lichtman and Eric A. Herzog for Defendants and Respondents.

Plaintiffs and appellants Pauline Fairbanks and Michael Cobb (Plaintiffs) appeal from the trial court's order denying their motion for class certification on their claim under the unfair competition law (UCL; Bus. & Prof. Code, § 17200)[1] against defendants Farmers New World Life Insurance Company and Farmers Group, Inc. (collectively, Farmers). This is the second appeal from a class certification ruling in this case. In an order issued April 9, 2009, the trial court denied Plaintiffs' first class certification motion. Plaintiffs appealed the denial, and Division Three of this court affirmed. (See *Fairbanks v. Farmers New World Life Ins. Co.* (2011) 197 Cal.App.4th 544 (*Fairbanks I*).) Division Three remanded the case for the trial court to consider whether to exercise its discretion to entertain certain certification arguments that Plaintiffs had raised on appeal but had not made in the trial court. (*Id.* at p. 547, fn. 2.) On remand, the trial court permitted Plaintiffs to raise several additional arguments and again denied certification. Plaintiffs now appeal from that ruling.[2]

We affirm. We conclude that the trial court applied the correct legal principles and that its decision to deny class certification is supported by substantial evidence. As discussed below, and as the trial court correctly concluded, although Plaintiffs have attempted to repackage their certification arguments, those arguments are unsuccessful for essentially the same reasons that Plaintiffs' first motion failed.

---

[1] Subsequent undesignated statutory references are to the Business and Professions Code.

[2] The appeal was transferred to this division from Division Three pursuant to California Rules of Court, rule 10.1000(b)(1)(B).

BACKGROUND

The facts relevant to Plaintiffs' class certification arguments are discussed in detail in *Fairbanks I.* We summarize the most pertinent facts below.

1. *The Farmers Universal Life Insurance Policies*

Plaintiffs challenge Farmers's design and marketing of a type of life insurance known as "universal" life insurance. Universal life insurance shares features with, but is different from, several other categories of life insurance typically labeled "term" insurance and "whole life" insurance. As its name implies, a "term" life insurance policy provides the right to a death benefit (i.e., a specified amount paid to a beneficiary in the event of the insured person's death) over a particular term (e.g, one year) in return for payment of a policy premium. The premiums for a term life policy that is renewed over time tend to increase as the insured person ages and the risk of death rises. (*Fairbanks I*, *supra*, 197 Cal.App.4th at pp. 547–548.)

In contrast, a "whole life" insurance policy operates to provide a life insurance benefit over the insured person's entire lifetime. The benefit is funded by a fixed premium that typically is greater than the actuarial risk of death in the early years of the policy. By paying more than is necessary to cover the risk of a policy pay-out in the early years, a whole life policy builds up a cash value that, along with accrued interest, can be used to cover the premium for the death benefit in later years. Eventually, the cash value of the policy can grow to the full death benefit. (*Fairbanks I*, *supra*, 197 Cal.App.4th at p. 548, fn. 3.)

Universal life insurance also provides a death benefit in return for payment of a premium. Like whole life insurance, a universal life policy permits the death benefit to be funded in

later years by building up a cash value through the payment of a premium in early years that exceeds the risk of death. However, unlike a whole life policy, the premiums for a universal life insurance policy can vary over time. The premiums are paid into an " 'accumulation account' " that is used to fund the death benefit. The amount of money accumulated in that account is a function of three primary variables: (1) the premium paid into the account by the policy holder; (2) the interest credited to the account by the insurer; and (3) the amounts deducted by the insurer for the cost of the death benefit.[3] The cost of the death benefit tends to increase over time as the insured person ages. (*Fairbanks I*, *supra*, 197 Cal.App.4th at pp. 547–549.)

Farmers sold two different varieties of universal life insurance at issue here. The salient difference between the two types of universal life policy concerned how the premiums were set. The "Farmers's universal life policy" (FUL) had a fixed premium that could be changed at the discretion of Farmers every five years. The "Farmers's flexible universal life policy" (FFUL) had a premium that, within broad parameters, could be set by the policy holder. (*Fairbanks I*, *supra*, 197 Cal.App.4th at p. 549.)

In addition to funding the cost of the death benefit, the accumulation account could have other benefits for the policy holder. Depending upon the policy holder's goals, the account could be used: (1) as an investment that accumulates interest on a tax-deferred basis; (2) to pay policy premiums; (3) to hold to maturity (age 95 or 100) and receive its cash value; or (4) as a

---

[3] Another less important variable for purposes of this case is the amount of administrative fees deducted from the accumulation account.

savings vehicle from which available funds can be withdrawn as desired. (*Fairbanks I*, *supra*, 197 Cal.App.4th at p. 548.)

Purchasers of the FFUL policy also had the option of selecting either a level or an increasing death benefit. A level death benefit acts as its name implies: the death benefit remains the same regardless of how much money is in the accumulation account. For example, so long as it remains in force, an FFUL policy with a level death benefit of $500,000 will pay that amount regardless of whether the insured dies during year 1 or year 30 of the policy.[4] An increasing death benefit provision pays the amount of the death benefit plus the amount in the accumulation account at the time of death. For example, if an insured with a $500,000 increasing death benefit policy died during year 10 of the policy with $50,000 in his or her accumulation account, the policy would pay his or her beneficiary $550,000. (*Fairbanks I*, *supra*, 197 Cal.App.4th at p. 548.)

For policies with a level death benefit, the money in the accumulation account can partially or completely offset the additional cost of insurance as the insured person ages. That is because the insurance that needs to be purchased decreases as the accumulation account grows.[5] Indeed, if high enough

---

[4] As explained in *Fairbanks I*, for tax reasons the amount of money in an accumulation account cannot exceed the death benefit. (197 Cal.App.4th at p. 549, fn. 4.) For that reason, Farmers's policies with a level death benefit operated to increase that benefit if the amount in the accumulation account grew large enough. (*Ibid.*)

[5] For example, for the hypothetical $500,000 level death benefit policy, the insurance that must be purchased would be $500,000 less the amount in the accumulation account.

premiums are paid in early years when the risk of loss (and therefore the cost of insurance) is lower, eventually the amount of premium necessary to maintain the death benefit can decrease or even disappear. However, for policies with an increasing death benefit, the accumulation account does not offset the cost of insurance, because the same amount of insurance must be purchased while the cost of that insurance rises over time as the insured ages.[6] (*Fairbanks I*, 197 Cal.App.4th at pp. 548–549.)

Both the FUL and FFUL policies gave Farmers the discretion to set the interest credited to the accumulation account and the cost of insurance deducted from the account subject to guaranteed minimums (for interest) and maximums (for the cost of insurance). The guaranteed minimum interest rate was 4.5 percent. The guaranteed maximum "risk charges" (i.e., payments for the cost of insurance) varied by age and were set out in tables in the policies.

2. *Plaintiffs' Allegations*

Plaintiffs' complaint and their initial class certification motion focused on alleged misrepresentations in the marketing of Farmers's universal life insurance policies. (*Fairbanks I*, *supra*, 197 Cal.App.4th at pp. 551–552.) Plaintiffs' theory was that Farmers designed the universal life policies to be "underfunded" and concealed that fact from purchasers. Plaintiffs alleged that Farmers set the premiums for the FUL policies too low and established a commission structure that incentivized sales agents

---

[6] For the hypothetical $500,000 policy with an *increasing* death benefit, the amount of insurance that must be purchased to provide the death benefit remains at $500,000 over time, because the amount in the accumulation account is paid out at death and is therefore not deducted from the insurance amount.

to encourage purchasers to set the initial premiums on FFUL policies too low. (*Id.* at pp. 553–554.) Purchasers therefore failed to grow their accumulation accounts sufficiently to cover the cost of insurance in later years of the policies. This meant that consumers were forced later either to pay significantly higher premiums to keep their policies in place or allow the policies to lapse. Plaintiffs claimed that this practice defeated consumers' expectation that the universal life policies would be a form of "permanent" insurance that would be in place, if desired, for their entire lives. (*Id.* at p. 553.)

Farmers allegedly engaged in this practice to enhance its profits, which Plaintiffs claimed were driven primarily by payments for the cost of insurance.[7] Plaintiffs claimed that, because premiums above the cost of insurance were credited to the policy holder in the accumulation accounts, they did not contribute significantly to Farmers's profits and could negatively affect those profits by reducing the cost of insurance.

Plaintiffs alleged that Farmers marketed its universal life policies through common methods that concealed the alleged underfunding. Sales agents allegedly were trained in a common scheme to provide prospective clients with illustrations of a policy's performance that provided a misleading picture of the

---

[7] In addition to the cost of insurance, the other source of Farmers's profits from the universal life policies was the "interest margin" on policy holders' accumulation accounts (i.e., the difference between what Farmers could make by investing the money in those accounts and the interest that it paid to policy holders). Plaintiffs relied upon evidence that they claimed showed Farmers intentionally kept that margin low by offering a relatively high interest rate to attract new customers and compensated for that interest rate with high costs of insurance.

likely balance in the accumulation account over time and the likelihood that the policy could be maintained to maturity at projected premium and interest levels. (*Fairbanks I*, *supra*, 197 Cal.App.4th at p. 550.) Language in marketing brochures and in the policies themselves was also allegedly misleading in describing the universal life policies as a form of permanent insurance. (*Id.* at p. 564.) Through its marketing strategies, Farmers also allegedly failed to disclose other information about the universal life policies affecting their value and permanence, such as: (1) Farmers set interest rates for the accumulation accounts at levels designed to preserve a profit for Farmers; (2) premiums were not likely to vanish over time based upon realistic projections of interest and risk rates; and (3) Farmers could dramatically change interest and risk rates within the minimum and maximum limits set in the policies. (*Id.* at p. 551.)

As the court noted in *Fairbanks I*, Plaintiffs' arguments for class certification in its first motion depended upon a *combination* of alleged factors relating to both the structure and the marketing of its universal life policies. In essence, Plaintiffs claimed that the policies were both designed to be underfunded and that they were misleadingly marketed as permanent. (*Fairbanks I*, *supra*, 197 Cal.App.4th at p. 553.)

3. *The Rulings On Plaintiffs' First Class Certification Motion*

The trial court denied Plaintiffs' initial class certification motion on April 9, 2009. The court described the "overarching question of fact, according to Plaintiffs," as "whether Farmers designed the FUL and FFUL policies to deny policyholders lifetime security, while concealing the inherent structural risks which made them precarious." The trial court concluded that this

question could not be resolved through common proof and that common issues therefore did not predominate.

The court found that "[t]here is no evidence that the same material misrepresentations have actually been communicated to each member of this class." The court also found "no evidence to show that the insurance consumer is monolithic." Universal life insurance policies "can be used to address these varying consumer needs in different ways," which can include holding the policies for various periods of time. The court cited Plaintiffs' admission that "underfunding is a relative concept," and also relied upon a survey conducted by Plaintiffs that showed that "different policyholders had different expectations and objectives." The survey revealed that 47.4 percent of a sample of FFUL policyholders said they would have purchased their policy even if Farmers had disclosed that premium payments "would not automatically guarantee the policy would remain in force."

The court in *Fairbanks I* affirmed the trial court's ruling. (*Fairbanks I*, *supra*, 197 Cal.App.4th at pp. 566–567.) The court considered only Plaintiffs' claim under the "fraudulent" prong of the UCL, finding that Plaintiffs had waived any claim under the "unfair" business practices prong by failing to pursue an unfair business practices theory in their motion for class certification. (*Id.* at p. 552.)[8] The court held that a "class action cannot proceed for a fraudulent business practice under the UCL when it cannot be established that the defendant engaged in uniform conduct likely to mislead the class." (*Id.* at p. 562.)

---

[8] The UCL defines unfair competition to include any "unlawful, unfair or fraudulent business act or practice." (§ 17200.)

The court concluded that substantial evidence supported the trial court's conclusion that the "alleged misrepresentations of permanence were not commonly made to members of the class." (*Fairbanks I*, *supra*, 197 Cal.App.4th at p. 564.) The court also rejected Plaintiffs' argument that the language in the policies themselves suggested the policies were permanent, concluding that the language of the policies could not be considered apart from "the information conveyed by the Farmers agents in the process of selling them." (*Ibid.*)

In addition, the court affirmed the trial court's finding that the materiality of alleged representations of policy permanence could not be resolved through common evidence because "the materiality of such representation to any given policyholder is a matter of individual proof." (*Fairbanks I*, *supra*, 197 Cal.App.4th at p. 565.) The court noted that permanence was only one factor that might make a universal life policy attractive to a particular purchaser. Other factors might include: "the ability to skip payments and not lose coverage; the ability to increase or decrease FFUL premiums as financial circumstances require; the ability to change the death benefit without obtaining a new policy; and the ability to accrue tax-deferred interest. To a policyholder who purchased the FUL or FFUL with the goal of obtaining insurance for a fixed term, but with the flexibility offered by universal life, permanence would be irrelevant." (*Ibid.*)

Because Plaintiffs had premised their class certification theory on the combined effect of both the design and the marketing of the universal life policies, the court in *Fairbanks I* held that the trial court could use its discretion on remand to consider whether a class "could or should be certified based on

allegations of non-marketing-related allegedly improper practices standing alone." (*Fairbanks I*, *supra*, 197 Cal.App.4th at p. 547, fn. 2; *id.* at p. 566.) While declining to express any view on the merits of other certification theories, the court gave several examples of other classes that the trial court might consider, including: (1) a class allegedly injured by Farmers's alleged underfunding "standing alone;" (2) a class of FUL policyholders whose policies lapsed even though they paid all required premiums; and (3) a class of policyholders who paid their premiums quarterly and were allegedly subject to a 20 percent surcharge. (*Id.* at p. 566.)

4. *Plaintiffs' Renewed Class Certification Motion*

On remand, the trial court (Judge Mohr) rejected some of Plaintiffs' proposed grounds for a renewed class certification motion, but granted Plaintiffs' request to file a motion seeking certification of a class of "[i]ndividuals whose policies were likely to be underfunded over time, resulting either in unreasonable increases in their premiums or forced lapse of their policies." The court also gave Plaintiffs leave to file a motion seeking certification of other possible classes identified in *Fairbanks I*, including (1) a class of all FUL policyholders who made quarterly payments and were assessed a 20 percent surcharge and (2) a class of FUL policyholders whose policies lapsed even though they paid all required premiums.

Consistent with the ruling in *Fairbanks I*, the court ordered that these claims "must stand alone and not involve marketing." The court also interpreted the opinion in *Fairbanks I* to mean that Plaintiffs had waived any claims under the "unfair" prong of the UCL for purposes of both appeal and any further proceedings on remand. The court therefore limited any renewed motion to a

claim based upon alleged violation of the "unlawful" prong of the UCL.

The renewed motion that Plaintiffs filed did not seek certification of any of the limited classes mentioned in *Fairbanks I*. Rather, Plaintiffs continued their focus on the general concept of "underfunding" that they had emphasized in their initial class certification motion.

Plaintiffs requested certification of two separate classes consisting of (1) purchasers of FUL policies and (2) purchasers of FFUL policies between November 3, 1984, and December 31, 1996. Plaintiffs sought certification of each of these classes under the "unlawful" prong of the UCL on the theory that " 'Farmers intentionally designed its FUL and FFUL policies to be underfunded in an effort to maximize its own profits at the expense of policyholders.' " Plaintiffs predicated the unlawfulness of this alleged conduct on various Insurance Code sections and on Farmers's alleged violation of the implied contractual covenant of good faith and fair dealing.

5. *The Trial Court's Ruling*

The trial court (Judge Hogue) denied Plaintiffs' motion in an order dated June 11, 2014. The court defined the "fundamental premise" of Plaintiffs' motion as whether the Farmers universal life policies were "underfunded." The court observed that the "problem for Plaintiffs is that despite 10 years of litigation, including more than six years of litigation over the question of class certification, Plaintiffs are unable to offer an objective definition of an 'underfunded' policy that is subject to common proof." The reason was that, "[a]t its core, the concept of underfunding is relative to the needs and goals of the individual policyholder."

The trial court cited a range of evidence for that conclusion. Plaintiffs' expert, Vincent Gallagher, testified that whether a policy is underfunded depends upon how long a policyholder is interested in keeping the policy.[9] Plaintiffs themselves had admitted during briefing on the initial class certification motion that " 'underfunding is a relative concept.' " The court again cited Plaintiffs' survey, which "revealed that (at least among FFUL policyholders) putative class members were evenly split on the question of whether they would have purchased a policy knowing that their premium payments were not automatically guaranteed to keep the policy in force to maturity."

In addition to this evidence, the court cited policyholder statistics that highlighted the different circumstances of universal life insurance purchasers. For example, Plaintiffs conceded that the 14,000 persons who had paid the maximum premium amount on an FFUL policy would not have had an underfunded policy and therefore "were not harmed by the contested practices." Plaintiffs requested that such persons be excluded from the class. Plaintiffs could not say whether an additional 65,000 FFUL policyholders who paid premiums 25 percent higher than the "target" identified by Farmers (amounting to 10 percent of the class) had underfunded policies. And Plaintiffs had no theory to explain how all the holders of the 45 percent of FUL policies that were out of force before the end of the class period (including those who had died and whose

---

[9] The court noted that Mr. Gallagher's definition of underfunding was particularly significant, as underfunding is not an insurance industry term but rather a concept "that Mr. Gallagher developed on his own."

beneficiaries had received their contractual death benefit) could have been affected by an allegedly underfunded policy.

The court also cited findings made by Judge Mohr in denying Plaintiffs original class certification motion about the lack of a common definition of underfunding. Citing testimony of various witnesses, Judge Mohr found that " '[p]olicyholders have different insurance needs and abilities to pay.' " Universal life policies can "address these varying consumer needs in different ways," depending upon how long policyholders want to keep their policies. Some policyholders "want their policies for a short period of time," and others "have medium and long term goals tied to events in their life, for example, the date their mortgage will be paid off, or the date their children will complete their education."

Finally, the court considered and rejected Plaintiffs' theory, first argued in their reply brief, that all holders of FUL and FFUL policies would have been harmed by underfunding regardless of how long they intended to keep their policies because of the alleged " 'diminution' " in the value of their accumulation accounts. Plaintiffs' theory was that "paying premiums that were insufficient [to] take their policies to maturity" meant that policyholders had less in their accumulation accounts to accrue tax deferred interest. The trial court observed that this theory simply amounted to a claim that Farmers had deprived policyholders of a kind of forced savings, and offered several hypothetical examples of putative class members who, depending upon their individual circumstances, might or might not have wanted more of the kind of savings that the universal life policies offered. The court concluded that this new underfunding theory, like Plaintiffs' "solvent-to-maturity"

theory, " 'gets into specifics of what's desired for the policy.' " Thus, "[t]he distinction between the two theories is not *whether* individualized questions of liability predominate, the only distinction is *which* individualized questions predominate."

Plaintiffs filed a timely notice of appeal on June 30, 2014.

DISCUSSION

1. *Appealability*

Denial of certification for an entire class is an appealable order. (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435–436 (*Linder*).) That is because an order denying certification is a "death knell" for absent class members, "constituting a final order in practical terms." (*Safaie v. Jacuzzi Whirlpool Bath, Inc.* (2011) 192 Cal.App.4th 1160, 1168 (*Safaie*), citing *Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695, 699.)

Several courts have concluded that a "practical consequence" of treating the denial of class certification as a final order is to foreclose the possibility of another attempt at class certification following an unsuccessful appeal (or after the time for appeal has passed). (See *Safaie*, *supra*, 192 Cal.App.4th at pp. 1170–1171; *Stephen v. Enterprise Rent-A-Car* (1991) 235 Cal.App.3d 806, 814 (*Stephen*).) The reason for this rule is that permitting both an appeal from the denial of class certification and successive motions to certify would result in " 'endless appeals violating the state's policy against piecemeal appellate litigation.' " (*Safaie*, at p. 1170; *Stephen*, at p. 814.)

In *Safaie*, the court held that the plaintiff had no right to appeal the trial court's denial of his motion to recertify a class after he had previously unsuccessfully appealed the trial court's ruling granting decertification of the class. The court concluded that the trial court's denial of the plaintiff's request "to insert

class allegations back into his individual action" was not a " 'death knell' " order because "the complaint already existed as an individual action." (*Safaie*, *supra*, 192 Cal.App.4th at pp. 1169–1170.) In *Stephen*, the court held that the trial court's denial of the plaintiff's renewed motion to certify a class was not appealable where the trial court had previously denied a motion to certify and the plaintiff's time to appeal the original denial had passed. (*Stephen*, *supra*, 235 Cal.App.3d at p. 814.)

The rule against successive motions to certify a class raises the question whether the trial court's June 11, 2014 order denying Plaintiffs' renewed class certification motion is appealable. Ordinarily, as a renewed certification motion following an unsuccessful appeal, Plaintiffs' motion would have been impermissible under the rule articulated in *Safaie* and *Stephen* and no appeal would have been possible from that motion. But the holding in *Fairbanks I* expressly permitted a renewed motion to certify a class on remand. That holding is the law of the case, and we do not reconsider it. (*Nally v. Grace Community Church* (1988) 47 Cal.3d 278, 301–302 [under the doctrine of law of the case, " 'the decision of an appellate court, stating a rule of law necessary to the decision of the case, conclusively establishes that rule and makes it determinative of the rights of the same parties in any subsequent retrial or appeal in the same case,' " quoting 9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 737, pp. 705–707].)[10]

---

[10] The trial court here concluded on remand from *Fairbanks I* that Plaintiffs' renewed motion was permissible with respect to theories that Plaintiffs had not previously raised because the order denying Plaintiffs' first motion was not a final order with respect to such theories. We do not agree with that

We therefore interpret the holding in *Fairbanks I* as an exception to the general rule against renewed certification motions. (See *Safaie*, *supra*, 192 Cal.App.4th at p. 1174 [suggesting that there "may be equitable exceptions to the rule precluding successive class certification motions after a final order denying certification"].) Because the trial court here was given discretion on remand to consider a renewed class certification motion, we treat the denial of that renewed motion as a final order and consider the appeal.

2. *Standard of Review*

An appellate court's review of a class certification order is "narrowly circumscribed." (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1022 (*Brinker*).) " ' "Because trial courts are ideally situated to evaluate the efficiencies and practicalities of permitting group action, they are afforded great discretion in granting or denying certification." ' " (*Ibid.*, quoting *Fireside Bank v. Superior Court* (2007) 40 Cal.4th 1069, 1089.) A trial court's ruling supported by substantial evidence will not generally be disturbed on appeal unless it was " ' "based upon improper criteria or erroneous legal assumptions." ' " (*Fairbanks I*, *supra*, 197 Cal.App.4th at p. 561; *Brinker*, at p. 1022.)

---

analysis. By considering the prior appeal, the court in *Fairbanks I* implicitly held that the first order denying class certification was final and appealable. That holding is itself law of the case. (*Olson v. Cory* (1983) 35 Cal.3d 390, 399–400 [appealability of a declaratory judgment was " 'implicitly decided' " in a prior appeal and therefore became the law of the case].) However, the court in *Fairbanks I* expressly permitted a further class certification motion, and that holding is also law of the case.

Therefore, on appeal the court must examine the reasons given by the trial court for denying class certification. (*Fairbanks I*, *supra*, 197 Cal.App.4th at p. 561.) " 'Any valid pertinent reason stated will be sufficient to uphold the order.' " (*Linder*, *supra*, 23 Cal.4th at p. 436, quoting *Caro v. Procter & Gamble Co.* (1993) 18 Cal.App.4th 644, 656.)

3. *The Trial Court Applied the Correct Legal Standard*

A class action asserting claims under the UCL must comply with the requirements of Code of Civil Procedure section 382. (See Bus. & Prof. Code, § 17203.) Under that section, a party seeking certification of a class must "demonstrate the existence of an ascertainable and sufficiently numerous class, a well-defined community of interest, and substantial benefits from certification that render proceeding as a class superior to the alternatives." (*Brinker*, *supra*, 53 Cal.4th at p. 1021.) The " ' "community of interest" ' " requirement in turn includes three factors: " ' "(1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class." ' " (*Ibid.*) The " 'ultimate question' " in assessing predominance is "whether 'the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants.' " (*Duran v. U.S. Bank National Assn.* (2014) 59 Cal.4th 1, 28 (*Duran*).)

The trial court correctly identified these requirements and focused on the issue in dispute: "Whether common questions of law or fact predominate." Citing *City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 462 (*San Jose*), the trial court also

correctly observed that its analysis was guided by the principle that "class actions do not alter the substantive law," but are only a means to enforce that law. (See *Duran*, *supra*, 59 Cal.4th at p. 34 ["We have long observed that the class action procedural device may not be used to abridge a party's substantive rights"].)

a. *Causation in a UCL class action*

Section 17204 provides that a private plaintiff has standing to bring a UCL action only if he or she "has suffered injury in fact and has lost money or property as a result of the unfair competition." Only the named plaintiffs in a UCL class action need to meet this requirement of showing actual pecuniary loss. (*In re Tobacco II Cases* (2009) 46 Cal.4th 298, 320 (*Tobacco II*).) However, as the trial court correctly recognized, the issue of standing is different from causation. (*Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 335–336.) The trial court properly considered whether Plaintiffs could establish causation of injury for absent class members through common proof.

Our Supreme Court explained in *Tobacco II* that causation of injury in the context of a UCL class action means something less than individual proof of actual loss. Under section 17203, absent class members may seek restitution of money or property " 'which *may have been acquired'* by means of" the defendant's unfair competition. (*Tobacco II*, *supra*, 46 Cal.4th at p. 320.) Thus, absent class members do not need to prove actual loss on an individualized basis. (*Ibid.*)

However, subsequent cases (including, critically, *Fairbanks I*) have held that a class is overbroad (and hence not amenable to common proof) if it contains substantial numbers of persons who are not entitled to restitution because the defendants *could not* have acquired their property "by means of"

the challenged conduct. (See *Pfizer, Inc. v. Superior Court* (2010) 182 Cal.App.4th 622, 631–633 (*Pfizer*); *Sevidal v. Target Corp.* (2010) 189 Cal.App.4th 905, 925–926 (*Sevidal*); *Davis-Miller v. Automobile Club of Southern California* (2011) 201 Cal.App.4th 106, 124 (*Davis-Miller*); *Fairbanks I*, *supra*, 197 Cal.App.4th at p. 562.) As the court explained in *Sevidal*, although the causation standard under section 17203 is less stringent than proof of actual loss, "it is not meaningless." (*Sevidal*, at p. 924.)

In *Sevidal*, the evidence showed that "the vast majority of absent class members never saw the Web page containing the alleged misrepresentation[s]" concerning the country of origin for various items that Target sold. The court concluded that the proposed class was overbroad because such persons "were never exposed to the alleged wrongful conduct." (*Sevidal*, *supra*, 189 Cal.App.4th at p. 910.) In *Pfizer*, the court held that the trial court properly denied class certification where large numbers of class members were never exposed to allegedly misleading advertisements for the sale of mouthwash. (*Pfizer, supra*, 182 Cal.App.4th at p. 632.) And, as discussed above, in *Fairbanks I* the court concluded that class certification on Plaintiffs' UCL fraud claim was properly denied where substantial evidence showed that "the alleged misrepresentations of permanence were not commonly made to members of the class." (*Fairbanks I*, *supra*, 197 Cal.App.4th at p. 564.)

In *Davis-Miller*, the court affirmed the denial of class certification on a UCL claim challenging an alleged scheme for the unnecessary replacement of automobile batteries. As here, the alleged improper conduct in that case included both alleged misrepresentations and an unlawful underlying business practice. The defendant allegedly replaced batteries

unnecessarily in a roadside assistance program and engaged in false advertising concerning that program. The court concluded that the trial court properly denied class certification on both theories, as the evidence showed that most class members in fact needed a battery replacement and were therefore not exposed to the alleged wrongful conduct. (*Davis-Miller*, *supra*, 201 Cal.App.4th at pp. 124–125.)

These cases hold that a class containing a significant number of persons who could not have been affected by the defendant's challenged conduct is fatally overbroad. The cases that Plaintiffs cite do not contradict this principle.

In *Steroid Hormone Product Cases* (2010) 181 Cal.App.4th 145 and *Weinstat v. Dentsply Internat., Inc.* (2010) 180 Cal.App.4th 1213, 1222–1224, the courts reversed class certification orders where the trial courts had erroneously applied a legal standard requiring proof of actual injury by absent class members that our Supreme Court rejected in *Tobacco II*. In *McAdams v. Monier, Inc.* (2010) 182 Cal.App.4th 174, the plaintiffs' UCL claim was based upon one "material misrepresentation" that roof tiles would last, maintenance free, for 50 years, when in fact the tiles "would erode to bare concrete" well before that time. (*Id.* at pp. 191–193.) The class that the court approved consisted only of persons who were exposed to the misrepresentation, and there was no suggestion in that case that the misrepresentation would be immaterial to any significant component of that class. (*Ibid.*) These cases confirm that individual proof of reliance and actual injury is not required for absent class members under the UCL (which the trial court here acknowledged), but they do not hold that causation is irrelevant.

Plaintiffs also rely on the principle that " '[a]s a general rule if the defendant's liability can be determined by facts common to all members of the class, a class will be certified even if the members must individually prove their damages.' " (*Brinker*, *supra*, 53 Cal.4th at p. 1022.) Plaintiffs cite various wage and hour cases permitting class actions to proceed where employers had a "uniform policy consistently applied to a group of employees," even if employees might individually need to prove their damages. (*Id.* at p. 1033.)

That some courts have permitted class actions to proceed where employers implemented a uniform policy likely to affect all class members, even if some class members managed to avoid the impact of those policies, does not contradict the legal standard the trial court employed here. The cases that Plaintiffs cite did not involve proposed classes that included significant numbers of persons who *could not* have been injured by the defendants' challenged conduct because of their individual circumstances. Indeed, in *Brinker* the court reversed the trial court's certification order concerning one proposed subclass that, as a result of the court's ruling on the merits of the plaintiffs' claim, included individuals who would "have no claim" against the defendant. (*Brinker*, *supra*, 53 Cal.4th at p. 1050.)

Moreover, the court recently confirmed in *Duran* that "class treatment is not appropriate 'if every member of the alleged class would be required to litigate numerous and substantial questions determining his individual right to recover following the "class judgment" on common issues.' " (*Duran*, *supra*, 59 Cal.4th at p. 28.) Thus, " '[o]nly in an extraordinary situation would a class action be justified where, subsequent to the class judgment, the members would be required to individually prove not only

damages but also liability.' " (*Id.* at p. 30, quoting *San Jose*, *supra*, 12 Cal.3d at p. 463.) In *Duran*, which involved a claim of unlawful employee classifications under section 17200, the court reversed the trial court's class certification order and the subsequent judgment on the ground that the statistical sampling method the court used to adjudicate the class claims at trial precluded the defendant from litigating its individual affirmative defenses. (*Duran*, at pp. 16, 49–50.)

The trial court here quoted the "may have been acquired" standard in section 17203, and cited *Sevidal* and *Pfizer* for the proposition that the " 'UCL . . . still require[s] some connection between the defendant's alleged improper conduct and the unnamed class members who seek restitutionary relief.' "[11] That conclusion was correct, and the record therefore reflects that the trial court employed the correct legal standard.

b. *Application to Plaintiffs' case*

Plaintiffs argue that the trial court also erred in applying the legal standard to its case because the court did not consider Plaintiffs' "theory of recovery" in assessing whether the claims of absent class members could be adjudicated through common evidence. (See *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 327 ["in determining whether there is substantial evidence to support a trial court's certification order, we consider whether the theory of recovery advanced by the proponent of certification is, as an analytical matter, likely to prove amenable

---

[11] Although the trial court also referred to the need to prove "class-wide injury," the court's citation to section 17203 and the cases interpreting that section in light of *Tobacco II* make it clear that the trial court did not apply a standard that required proof of *actual* monetary loss by all class members.

to class treatment"].) Citing *Tobacco II*, Plaintiffs claim that the trial court should have focused on Farmers's conduct and not whether Plaintiffs could prove class-wide injury. (See *Tobacco II*, *supra*, 46 Cal.4th at p. 324 [the focus of the UCL is "on the defendant's conduct"].) Plaintiffs complain that the trial court did not discuss or cite the evidence that Plaintiffs claim showed that Farmers executives manipulated the variables affecting how its policyholders' accumulation accounts were funded (i.e., premiums, interest rates, and cost of insurance) to enhance Farmers's profits without considering the best interests of their insureds.

Plaintiffs are wrong in arguing that the trial court was legally required to focus only on Farmers's alleged wrongful conduct without also considering the effect of that conduct on class members. Plaintiffs' argument amounts to a claim that proof of injury is irrelevant in a UCL class action. We do not agree. Rather, we agree with the court in *Sevidal* that, while the standard under section 17203 "focuses on the defendant's conduct and is substantially less stringent than a reliance or 'but for' causation test, it is not meaningless." (*Sevidal*, *supra*, 189 Cal.App.4th at p. 924.)[12] The trial court here was not limited to considering only the nature of Farmers's conduct, but could also properly consider whether Plaintiffs could prove the effects of that conduct on class members through common evidence.

---

[12] That interpretation is also consistent with our Supreme Court's decision in *Duran*, which held that even when an employer imposes a "uniform policy" on class members, the court must consider whether the "effects" of that policy can be proved efficiently in a class setting. (See *Duran*, *supra*, 59 Cal.4th at p. 29.)

Plaintiffs argue that, because Farmers's alleged wrongful conduct was the same with respect to all its universal life *policies*, all *policyholders* were "exposed" to that conduct. Plaintiffs claim that Farmers's alleged uniform conduct in manipulating the variables in the universal life policies for its own benefit made "all who purchased them vulnerable to the risk of loss," and that risk is all that is necessary to certify a class under the UCL.

This argument misinterprets what it means to be "exposed" to wrongful conduct. The cases that have denied class certification under the UCL on the ground that substantial numbers of class members were not "exposed" to the defendants' challenged conduct did so because there was no possibility that those class members could have suffered a loss due to that conduct. " 'Such persons cannot meet the standard of section 17203 of having money restored to them because it "may have been acquired by means of" the [fraudulent or] unfair practice.' " (*Sevidal*, *supra*, 189 Cal.App.4th at p. 926; see also *Pfizer*, *supra*, 182 Cal.App.4th at p. 632.) Persons who have not seen misleading advertisements fall in that category. (*Sevidal*, at pp. 926–928; *Pfizer*, at pp. 631–632; *Fairbanks I*, *supra*, 197 Cal.App.4th at p. 562.) So do persons who could not have been affected by an alleged wrongful scheme. (See *Davis-Miller*, *supra*, 201 Cal.App.4th at p. 125 ["plaintiffs failed to meet their burden of showing that the unnecessary replacement of batteries was a common issue of fact"].)

When a class contains a significant number of persons who could not have been affected by the challenged conduct, a court can reasonably conclude that liability cannot be proved with common evidence. Thus, even if Plaintiffs could prove through

common evidence that Farmers acted wrongfully, the trial court acted within its discretion in concluding that the *effect* of that conduct on members of the proposed class was not amenable to common proof.

The court in *Fairbanks I* recognized this distinction between proving the wrongfulness of Farmers's challenged conduct and showing its impact on class members. The court affirmed the trial court's denial of class certification on the ground that individual proof was necessary both to show whether misrepresentations of policy permanence were made and whether those misrepresentations would be material "to any given policyholder." (*Fairbanks I*, *supra*, 197 Cal.App.4th at p. 565.) In other words, the court concluded that the trial court properly considered whether (1) the alleged wrongful *conduct* and (2) the *impact* of that conduct were each subject to common proof.[13]

Plaintiffs describe their "underfunding" theory as "when the policy premiums are too low at any given time to provide an income stream sufficient to sustain the policy to maturity." For the same reason that Farmers's alleged failure to disclose the "underfunding" of its universal life policies would not be material to policyholders who did not intend to keep their policies for life, Farmers's alleged business decision to structure those policies to be underfunded would not be material to those policyholders. Plaintiffs' argument that Farmers's alleged wrongful conduct affected all universal life policies therefore misses the mark.[14]

---

[13] As discussed above, the holding in *Fairbanks I* is the law of the case, and is controlling here.

[14] Plaintiffs also suggest that the trial court erred in considering whether all class members could have suffered a loss because the two proposed classes "will at a minimum be entitled

Plaintiffs attempt to illustrate the common effect of Farmers's conduct by analogizing the Farmers universal life policies to a product with a concealed defect, such as a car without the airbags required by federal law. Plaintiffs claim the alleged defect here is that the universal life policies were underfunded and therefore did not operate as whole life policies. Plaintiffs' theory is that this defect affected all policies, making individualized proof of impact unnecessary.

This analogy ignores the differences in the preferences and goals of different policyholders, which the trial court has twice found exist and the court in *Fairbanks I* concluded was a reasonable finding from the evidence. Whether a policy was "underfunded" depends upon the desires of a particular policy holder. The policies simply were not "defective" for a substantial number of purchasers.

---

to injunctive relief." But the trial court could properly consider Plaintiffs' theory of recovery in deciding whether to certify a class. (See *Pfizer*, *supra*, 182 Cal.App.4th at p. 632 [class was overbroad because "many class members, if not most, clearly are not entitled to restitutionary disgorgement"]; *Sevidal*, *supra*, 189 Cal.App.4th at p. 923 ["the proposed class was overbroad because a substantial portion of the class would have no right to recover on the asserted claims"].) Indeed, Plaintiffs argue strenuously that the trial court was required to do so. Plaintiffs did not request an injunction-only class in the trial court. Such a proposed class might have raised other certification issues, such as why a class action is necessary to obtain effective injunctive relief. (See *Frieman v. San Rafael Rock Quarry, Inc.* (2004) 116 Cal.App.4th 29, 36 ["when the members of a proposed class have no individual monetary loss that may be redressed by disgorgement, that factor may weigh against class treatment"].)

Thus, rather than a defective product, a more apt analogy is to a product that meets some consumers' needs. For example, a car might be designed to last only 50,000 miles before incurring significant servicing costs, but be sold more cheaply than a similar car that will last 100,000 miles. Some purchasers who plan to keep the car for only a few years may prefer the cheaper version. Others might prefer the longer lasting model. The fact that a company sells just the cheaper car because it is more profitable does not injure those who prefer that model anyway.[15]

The trial court concluded that it could not simply ignore individual differences in the effect of Farmers's challenged conduct in permitting the case to proceed as a class action. That conclusion was solidly based on the governing legal standard. (See *Duran*, *supra*, 59 Cal.4th at p. 35 ["the trial court could not abridge [the defendant's] presentation of an exemption defense simply because that defense was cumbersome to litigate in a class action"].)

4. *The Trial Court's Ruling Is Supported By Substantial Evidence*

a. *The trial court's findings on proof of impact*

Abundant evidence supports the trial court's finding that Plaintiffs could not prove the impact of Farmers's alleged underfunding scheme with common evidence. Plaintiffs' own survey showed that about half of FFUL policy owners would have purchased their policies even if they had known that the premiums would not be sufficient to take the policy to maturity.

---

[15] Of course, misrepresentations about how long the car will last might affect a consumer, but the court in *Fairbanks I* already disposed of Plaintiffs' misrepresentation theories as a basis for class certification.

That evidence, which was also persuasive to the court in *Fairbanks I*, was highly relevant to Plaintiffs' task of proving that Farmers may have acquired money from class members "by means of" its alleged wrongful conduct. (§ 17203; *Fairbanks I*, *supra*, 197 Cal.App.4th at p. 565; see also *Duran*, *supra*, 59 Cal.4th at p. 35 [trial court erred in failing to consider evidence that "nearly one-third of the class may have been properly classified as exempt and *lacking any claim against*" the defendant].) In addition, the trial court properly relied on testimony from Plaintiffs' expert and on Plaintiffs' own characterization of its "underfunding" theory in concluding that underfunding " 'is a relative concept.' "

In ruling on Plaintiffs' renewed motion the trial court also was not painting on a blank canvas. The trial court made findings in ruling on Plaintiffs' original motion that applied equally to Plaintiffs' stand-alone "underfunding" theory. In ruling on Plaintiffs' initial class certification motion the trial court found that "it is impossible to determine, as a matter of common proof, whether the allegedly misrepresented permanence of the FUL and FFUL policies was material to the entire class of FUL and FFUL policyholders." (*Fairbanks I*, *supra*, 197 Cal.App.4th at p. 565.) The court in *Fairbanks I* affirmed that finding.

The trial court was entitled to rely on those findings in concluding that Farmers's alleged underfunding scheme would affect different class members differently. While the court in *Fairbanks I* remanded for purposes of considering various different class certification theories, the court did not invite the trial court to reconsider its factual findings, which the appellate court had determined were based on substantial evidence.

Whether or not those factual findings were technically law of the case, the trial court properly accepted them in ruling on Plaintiffs' renewed motion.[16]

The trial court also reasonably rejected Plaintiffs' "forced savings" theory of common impact. Under that theory, all policyholders were harmed by Farmers's conduct because they all paid lower premiums than they would have paid with a fully funded policy. That meant that they accumulated less money in their accumulation accounts.

The trial court acted within its discretion in concluding that this theory of harm also could not be proved with common evidence. Unlike Plaintiffs' theory that policy premiums were insufficient to guarantee that Farmers's universal life policies would last to maturity, this "forced savings" theory of wrongdoing could conceivably affect policyholders who did not intend to keep their policies for life. But it still depends upon the individual circumstances and preferences of policyholders. Accumulation of tax-deferred savings is only one of the different functions that universal life policies can serve. (See *Fairbanks I*, *supra*, 197 Cal.App.4th at p. 565 [listing various reasons for purchasing universal insurance, of which "the ability to accrue tax-deferred interest" is only one].) Moreover, as the trial court observed, different policyholders will have different opportunities and preferences for their investment dollars. Some might prefer to

---

[16] See *Safaie*, *supra*, 192 Cal.App.4th at page 1173 (the law of the case "prevents only certain challenges to a legal principle that has already been decided," but the broader rule on the finality of class certification rulings "bars any additional challenges to a denial of certification once the denial has become final.")

pay lower insurance premiums while accumulating savings elsewhere. And others who paid for and received a fixed death benefit would not have suffered any loss regardless of how much was in their accumulation account when they died. As the trial court found, "[s]uch a person would have received precisely what he or she bargained for—a fixed death benefit in exchange for premium payments."

In their reply brief, Plaintiffs propose yet another variation of their underfunding theory that focuses on only two of the three variables affecting the value of policyholders' accumulation accounts. Plaintiffs argue that all policyholders were harmed by underfunding regardless of their preferences for premiums because "Farmers could have increased interest rates and reduced the cost of insurance, and not raised premiums, which would have enabled the policies to function properly." This theory seeks to side-step the evidence of the different preferences among policyholders for the premiums that they pay.

Plaintiffs did not present this theory to the trial court and we therefore do not consider it on appeal. (*Fairbanks I*, *supra*, 197 Cal.App.4th at p. 552.) In any event, the theory ignores Plaintiffs' own allegations concerning the interrelated nature of the variables that affect the policyholders' accumulation accounts. Plaintiffs argued below that Farmers designed the universal life policies with high interest rates "to induce purchase," low premiums "to avoid paying out those high interest rates," and high risk charges to preserve profits. Particularly in light of Plaintiffs' own claim that all these factors affecting the value of accumulation accounts were related, we cannot simply assume—in the absence of a factual record and findings by the trial court—that Farmers could have increased the interest that

it paid or reduced the risk charges without some effect on premiums.[17]

b. *The trial court's findings on common proof of liability*

The trial court also found that Plaintiffs had not shown they could prove the statutory predicates for their theory of unlawful conduct under the UCL with common evidence. That finding is supported in the record.

Plaintiffs argued that they could establish the unlawfulness of Farmers's alleged conduct through various sections of the Insurance Code and the Penal Code. Each of the sections on which Plaintiffs rely addresses information communicated to, or withheld from, policyholders about their policies. (See Ins. Code, §§ 330 [defining "concealment" as "[n]eglect to communicate that which a party knows, and ought to communicate"], 331 [concealment entitles the injured party to rescission], 332 [requiring parties to insurance contracts to communicate material facts], 381 [requiring a policy to specify various terms, including the premium]; Pen. Code, § 550, subd. (b)(3) [addressing concealment of or failure to disclose an event that affects a person's right to an insurance benefit].) As the trial court correctly concluded, the court's ruling in *Fairbanks I* precludes claims based on alleged false representations about, or concealment of, underfunding. *Fairbanks I* upheld the trial

---

[17] Plaintiffs' new theory is also inconsistent with its concession below that policyholders who paid the maximum premiums "were not harmed by the contested practices." This would not make sense if Farmers allegedly acted wrongfully in failing to increase interest payments or decrease insurance charges regardless of the premiums paid.

court's finding that the materiality of alleged misrepresentations concerning policy permanence "is a matter of individual proof." (*Fairbanks I*, *supra*, 197 Cal.App.4th at p. 565.) Concealment of underfunding is subject to the same analysis.

Plaintiffs also argued that their claim of unlawful conduct under the UCL could be based upon an alleged breach of the implied contractual covenant of good faith and fair dealing. The trial court found that Plaintiffs identified "absolutely no evidence suggesting they are capable of proving breach of the implied covenant class-wide." The evidence of differences in preferences and goals among universal life policyholders supports that finding.

The trial court noted that Plaintiffs had not identified "the express provisions in the FUL or FFUL policies that Farmers allegedly undermined."[18] On appeal, Plaintiffs argue that Farmers breached the implied covenant in exercising its discretion under the universal life policies to set the variables (i.e., interest rates, insurance cost and, at least with respect to the FUL policies, premium rates) within the minimum and maximum parameters set forth in the policies. Plaintiffs argue that Farmers set those parameters with only its own interests in mind and without giving " 'at least as much consideration to the welfare of its insured.' "

---

[18] Plaintiffs argue that the trial court "erroneously assumed that the implied covenant is breached only where a party violates an express term of the contract." We do not read the trial court's ruling that way. It appears that the trial court found that Plaintiffs had not adequately explained the basis for their theory of breach of the covenant, much less how they would prove it on a class-wide basis. Our review of the briefs below on this issue supports that interpretation.

Plaintiffs describe the standard for breach of the implied covenant as "conduct that is outside the expectations of the contracting parties and frustrates the purpose of the contract." (Quoting *Wolf v. Walt Disney Pictures & Television* (2008) 162 Cal.App.4th 1107, 1124, fn. 9 (*Wolf*).) As our Supreme Court explained in *Egan v. Mutual of Omaha Ins. Co.* (1979) 24 Cal.3d 809, the implied covenant "requires each contracting party to refrain from doing anything to injure the right of the other to receive the benefits of the agreement. [Citations.] The precise nature and extent of the duty imposed by such an implied promise will depend on the contractual purposes." (*Id.* at p. 818.)

The evidence supports the trial court's conclusion that Plaintiffs did not adequately explain how they would prove breach of the implied covenant under this standard using evidence common to the class. The policy language does not limit how Farmers may exercise its discretion in setting policy variables, so long as they are set within the stated minimum and maximum values. This raises an initial question as to whether Plaintiffs could prove that Farmers breached the implied covenant at all. A party does not breach the implied covenant in exercising discretion provided to it under a contract if the party does what the contract expressly permits it to do. (See, e.g., *Wolf*, *supra*, 162 Cal.App.4th at pp. 1120–1121 ["although it has been said the implied covenant finds 'particular application in situations where one party is invested with a discretionary power affecting the rights of another' [citations], if the express purpose of the contract is to grant unfettered discretion . . . then the conduct is, by definition, within the reasonable expectation of the parties and 'can never violate an implied covenant of good faith and fair dealing' "].)

That question goes to the merits of Plaintiffs' claim, and we do not attempt to answer it here. However, the absence of particular policy language limiting Farmers's discretion also affects whether Plaintiffs could prove a breach (if any) with *common* evidence. As discussed above (and as previously held in *Fairbanks I*), substantial evidence shows that policyholders had different goals and expectations for their universal life policies, which affected the premiums they would prefer to pay. Plaintiffs cite authority for the proposition that, where a party has discretion under a contract, the "essence of the good faith covenant is objectively reasonable conduct." (*Lazar v. Hertz Corp.* (1983) 143 Cal.App.3d 128, 141; *Yue v. Conseco Life Ins. Co.* (C.D.Cal. 2012) 282 F.R.D. 469, 476.) But Plaintiffs do not explain how only one "objectively reasonable" choice for the exercise of Farmers's discretion in setting policy variables would apply to the entire class, where individual class members had different interests in how those policy variables would be set. (Compare *Yue, supra*, 282 F.R.D. at pp. 477–478 [cost of insurance charges that were increased in violation of policy language adversely affected all policyholders].)

5. *The Trial Court Properly Implemented the Mandate From Fairbanks I*

Plaintiffs argue that the trial court erred in interpreting the scope of the issues that it could properly consider on remand from *Fairbanks I.* Specifically, Plaintiffs claim that the court's conclusion in *Fairbanks I* that Plaintiffs had waived their argument under the "unfair" prong of section 17200 applied only to the appeal, and that the trial court should have permitted Plaintiffs to present that argument in their renewed motion on remand along with other arguments that the appellate court

specifically identified. We conclude that the trial court acted consistent with the scope of the remand in *Fairbanks I* by permitting Plaintiffs to raise their stand-alone "underfunding" theory, regardless of the legal label attached to it.

Plaintiffs argued below that "[i]t was the nature of the *practices* alleged, not the prong of the UCL violated, that drove the decision" in *Fairbanks I*. "On remand, the Court allowed the trial court discretion to consider *practices* not previously considered for class certification." We agree with this interpretation of *Fairbanks I*, although we draw a different conclusion from it. Plaintiffs argued below that the focus in *Fairbanks I* on practices rather than legal theory meant that they should be permitted to raise their "unfair" claim on remand. We conclude that, because they were permitted to present their underfunding theory on remand, the particular prong of the UCL on which they based that theory did not matter.

Plaintiffs had ample opportunity to seek certification on the factual theories that they chose to raise in a renewed motion, regardless of the particular prong of the UCL that applied to those theories. Both Plaintiffs and Farmers agreed in their briefs on appeal that the same arguments for and against certification under the "unlawful" prong of the UCL also apply to the "unfair" prong. Thus, the trial court gave Plaintiffs a sufficient opportunity to present its stand-alone underfunding theory, consistent with what the court contemplated in *Fairbanks I*. The specific portion of the UCL that applied to that theory was immaterial.

Moreover, we interpret the scope of Plaintiffs' rights on remand under the *Fairbanks I* opinion narrowly, consistent with the general rule that a denial of class certification is final.

Plaintiffs had a second chance that plaintiffs do not ordinarily receive. Plaintiffs have twice been unsuccessful in convincing the trial court that class certification is warranted. The most pertinent factual findings underlying both of Plaintiffs' motions have already been upheld on appeal. The trial court acted within the scope of its discretion in denying Plaintiffs' renewed motion on remand, and we therefore affirm.

DISPOSITION

The trial court's order denying Plaintiffs' renewed motion for class certification is affirmed. Farmers is entitled to recover its costs on appeal.

NOT TO BE PUBLISHED.

LUI, J.

We concur:

ROTHSCHILD, P. J.

JOHNSON, J.